Office - Supreme Court, U.S.
FILED
APR 15 1985
ALEXANDER L. STEVAS,
CLERK

84-1632

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD W. SUTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GORDON JAMES ARNETT
5875 N. Lincoln Avenue
Chicago, Illinois 60659
(312) 334-0400
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

3 COPIES

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals erred by refusing to consolidate this appeal with two related appeals; because, with the simultaneous pendency of more than six civil and criminal cases against Petitioner, such multiplicity of litigation being all related to the operation of his National Investment Publishing Company, subjected Petitioner to Double Jeopardy, Selective Prosecution, and Discriminatory Enforcement for his Political Activities through Freedom of the Press and of Speech.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
THE SEVENTH CIRCUIT COURT OF APPEALS ERRED BY REFUSING TO CONSOLIDATE THIS APPEAL WITH TWO RELATED APPEALS INVOLVING THE SAME DEFENDANT; BECAUSE, WITH THE SIMULTANEOUS PENDENCY OF MORE THAN SIX CIVIL AND CRIMINAL CASES AGAINST PETITIONER, SUCH MULTIPLICITY OF LITIGATION BEING ALL RELATED TO THE OPERATION OF HIS NATIONAL INVESTMENT PUBLISHING COMPANY, WOULD SHOW THAT HE WAS SUBJECTED TO DOUBLE JEOPARDY, SELECTIVE PROSECUTION, AND DISCRIMINATORY ENFORCEMENT FOR HIS POLITICAL ACTIVITIES THROUGH FREEDOM OF THE PRESS AND OF SPEECH .	4
SUMMARY AND CONCLUSION	25
APPENDIX	(Separate Volume)

TABLE OF AUTHORITIES

Page

Cases

Hendricks, et al. v. Hogan, et al., 324 F.Supp. 1277 (1971) 22

McCarthy v. United States, 394 U.S. 459 (1968) . 13, 14

McCullough v. Suter, No. 84-1516 (7th Cir., March 13, 1985) 4, 8, 11, 12, 14, 16

North Carolina v. Pearce, 395 U.S. 711 (1969) .. 14, 15

Securities and Exchange Commission v. Christopher Lowe, No. 83-1911 (1985) 4

Securities and Exchange Commission v. Richard W. Suter, 732 F.2d 1294 (7th Cir. 1984) ... 16

Securities and Exchange Commission v. Richard W. Suter, No. 83-3011 [7th Cir., stayed pending Supreme Court decision in *S.E.C. v. Christopher Lowe* (above)] 8, 12, 16

United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974) 19, 20

United States v. Block, 660 F.2d 1086 (5th Cir. 1981) 12

United States v. Falk, 479 F.2d 616 (7th Cir. 1973) . 20

United States v. Gaertner, 583 F.2d 308 (7th Cir. 1978) 15

United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978) 18, 19

United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974) 22

United States Constitution

First Amendment: Freedom of Speech and of the Press, and No Political Prisoners .. 4, 10, 12, 17, 18

Fifth Amendment: Multiple Prosecutions and Selective Prosecution 14

Statutes

18 U.S.C. § 1341 2

28 U.S.C. § 1254(1) 2

Federal Rules Of Criminal Procedure

Rule 11(a)(2), (c)(1) and (f) 13

Rule 12(e) 15

Rule 32(d) 5, 23, 24

Rule 32.1(b) 23, 24

Other Authorities

21A Am.Jur.2d 281 21

In The

Supreme Court of the United States

October Term, 1984

RICHARD W. SUTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

Defendant Richard W. Suter was convicted in the United States District Court for the Northern District of Illinois of mail fraud and was sentenced to a term of imprisonment of one year, followed by five years probation, conditioned upon, among other things, his payment of restitution in the amount of $67,800. The Seventh Circuit Court of Appeals affirmed. Defendant filed a Petition for a Rehearing, which was denied on February 14, 1985.

JURISDICTION

The United States Supreme Court has jurisdiction under United States Supreme Court Rule 21 and related federal statutory and constitutional provisions. The Writ of Certiorari ought to be granted, because constitutional issues of Selective Prosecution for Political Free Speech and Press have occurred because the trial court refused a hearing on selective prosecution, and the Court of Appeals refused to consolidate this appeal with two related appeals, to which the Prosecutor had made reference at the sentencing hearing. This Petition for Writ of Certiorari was filed within sixty days of the denial of the Petition for Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On August 10, 1982, Richard W. Suter was charged in a 23-count indictment alleging mail fraud. 18 U.S.C. § 1341. In essence, the indictment charged that Suter had engaged in a fraudulent scheme to obtain monies through the mails from individuals wishing to acquire rare coins. Through advertisements which ran in a newsletter he published, Suter offered his services as a broker, stating that upon receipt of a pre-paid order, he would purchase coins and ship them to the customer. However, in many instances, Suter would either fail to provide coins or refunds to customers, sending them letters containing false

representations as to why their orders had not been filled, or refunds returned, in order to retain their money. Pursuant to a written plea agreement entered into with the government, Suter agreed to plead guilty to Counts 3 and 15 of the indictment in return for the government's promise to dismiss the remaining counts and make no recommendation to the court concerning what sentence or fine to impose. Following a lengthy hearing held on June 24, 1983, the court accepted Suter's plea and entered a finding of guilt and judgment of conviction as to Counts 3 and 15. Several months later, following extensive plea negotiations between Suter and the government, Suter agreed to make restitution in the amount of $67,830.34 to the victims of his coin brokerage scheme. However, one week before his scheduled sentencing on January 24, 1984, Suter filed a motion to withdraw his guilty plea. The government in response opposed the motion, and on January 24, 1984, after a hearing, the district court denied Suter leave to withdraw his plea, sentenced him to one year imprisonment on Count 3 and suspended imposition of sentence on Count 15, placing him on probation for a period of 5 years to run consecutively with the sentence in Count 3. As special conditions of probation, Suter was ordered to make restitution in the amount of $67,800 and not deal in coins. Suter appealed to the Seventh Circuit Court of Appeals, but they affirmed the conviction. He seeks a Writ of Certiorari from this Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED BY REFUSING TO CONSOLIDATE THIS APPEAL WITH TWO RELATED APPEALS INVOLVING THE SAME DEFENDANT; BECAUSE, WITH THE SIMULTANEOUS PENDENCY OF MORE THAN SIX CIVIL AND CRIMINAL CASES AGAINST PETITIONER, SUCH MULTIPLICITY OF LITIGATION BEING ALL RELATED TO THE OPERATION OF HIS NATIONAL INVESTMENT PUBLISHING COMPANY, WOULD SHOW THAT HE WAS SUBJECTED TO DOUBLE JEOPARDY, SELECTIVE PROSECUTION, AND DISCRIMINATORY ENFORCEMENT FOR HIS POLITICAL ACTIVITIES THROUGH FREEDOM OF THE PRESS AND OF SPEECH.

The Supreme Court is requested to make an examination of the correctness of the district court's denial of Suter's motion for leave to withdraw his plea. (See App. 66).

If the Supreme Court would allow Petitioner to consolidate the instant case with the 7th Circuit Appeal Number 84-1516, *McCullough v. Suter*, "The question for decision—one of first impression so far as we are able to determine—is whether a sole proprietorship can be an 'enterprise' with which its proprietor can be 'associated' ", decided March 13, 1985; and consolidate those two with the appeal which the Seventh Circuit is holding in abeyance pending the Supreme Court's decision in a virtually identical case, *S.E.C. v. Lowe*, (83-1911), then, Petitioner believes, it would become apparent that the Court of Appeals erred in not allowing a consolidation in their court. Such a consolidation would show that the multiplicity of litigation was itself an indication of the alleged Selective Prosecution for Political Activities, contrary to his constitutional rights of Freedom of Speech and of the Press. He would hope to be able to show either—

(1) Selective Prosecution and Discriminatory Enforcement for his political activities,

(2) Double Jeopardy by being charged with the same offense in both the instant case where R.I.C.O. was not alleged and in a civil case based on the same facts but with a R.I.C.O. finding with treble damages, or

(3) that, although he did "knowingly" plead guilty, he had not done so "understandingly" as to the consequences including that he would be less likely to be able to make $67,000 worth of restitution to the 23 victims as a condition of the 5-year probation period after his one-year prison sentence, as a direct result of the treble damage judgment on behalf of one of the victims in a civil case where there is a judgment of about 3 X $14,000 = $42,000. If as a result of that "Double Jeopardy" he does not fulfill said condition of probation, he could face an additional five years in prison. He had had no understanding whatsoever of such possible consequence, when he had pled guilty.

Petitioner agrees with that portion of the Opinion which reads:

> "Rule 32(d) of the Federal Rules of Criminal Procedure permits a defendant to withdraw a plea of guilty before sentence is imposed upon a showing to the court of 'any fair and just reason.' Whether the request will be granted or denied, however, ' "is within the sound discretion of the trial court and will not be reversed except upon an abuse of that discretion." ' *United States v. Thompson*, 680 F.2d 1145, 1151 (7th Cir.), *cert. denied*, 459 U.S. 1089 (1982), quoting, *United States v. Wright*, 407 F.2d 952, 954 (7th Cir. 1969). The trial court's findings on this issue will be upheld unless 'clearly erroneous.' *United States v. Michaelson*, 552 F.2d 472, 475 (2d Cir. 1977); *United States v. Fellus*, 573 F. Supp. 615, 618 (S.D. N.Y. 1983)." (App. 4)

He strongly disagrees, however, with the reasoning shortly thereafter, which reads:

> "the government has neither said or done anything which would constitute a sentence recommendation in breach of its plea agreement with Suter to make no recommendation; and Suter's present motion to withdraw his plea is obviously motivated by the civil consequences in the form of treble damages in related civil litigation." (App. 4)
>
> "Unconvinced by Suter's renewed claim of innocence, the district court at the plea withdrawal hearing determined that Suter was motivated in his request by collateral civil consequences to the plea, a reason insufficient, in the district court's opinion, to justify withdrawal of the plea: * * *" (App. 5-6)
>
> "We find the district court properly exercised its discretion in the denial of Suter's motion to withdraw his plea. Failing to advance a 'fair and just reason' for withdrawal of his plea, Suter was not entitled to an evidentiary hearing on the motion. *United States v. Thompson*, 680 F.2d at 1152." (App. 6)

On page 7 of the Opinion the Seventh Circuit continued:

> "Suter claims the district court abused its discretion in denying an evidentiary hearing on his motion to dismiss the indictment for selective prosecution. This court need not reach this issue, however, since Suter failed to preserve the issue for appellate review by not complying with the requirements of entering a 'conditional plea.' Fed. R. Crim. P. 11(a)(2). In his reply brief, Suter asserts for the first time a claim of double jeopardy. Issues raised for the first time in a reply brief are normally not considered on appeal. *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976), citing *Finsky v. Union Carbide & Carbon Corp.*, 249 F.2d 449, 459 (7th Cir. 1957), *cert. denied*, 356 U.S. 957 (1958). In any event, Suter has not been placed in jeopardy twice merely because he faces judgments or penalties in civil

> lawsuits or administrative actions based on the same fraudulent scheme for which he stands convicted in federal district court. *See, e.g., United States v. Hall*, 559 F.2d 1160, 1163 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *United States v. Barger*, 458 F.2d 396 (9th Cir. 1972) (per curiam); *United States v. Countryside Farms, Inc.*, 428 F. Supp. 1150, 1159 (D. Utah 1977)." (App. 7)

Probably the simplest and clearest way to express Petitioner Richard Suter's view of the issues is to direct this Court's attention to the footnote in the Seventh Circuit's Opinion, at page 5, footnote 3:

> "The transcript of the October 21 hearing demonstrates that on more than one occasion the prosecutor, in addressing the district court, prefaced her comments by explicitly stating that she was not making a recommendation as to what sentence the court should impose, and that her remarks should not be interpreted as such." (App. 5)

Why did she find it necessary to make such a statement "on more than one occasion"? Defendant is convinced that she was indeed making recommendations, which she knew the Plea Agreement forbade. It is like saying this cow is a horse because it has more than one sign saying it is.

By the Prosecutor's having implied to the Court at the sentencing hearing that Defendant had been prohibited from publishing newsletters, which was untrue, she gave the Court the erroneous view that incarceration of defendant would have no significantly adverse effect on the more than 4,000 subscribers to defendant's newsletters who each paid more than $100 a year to receive same. The fact is that such newsletters are written and edited solely by this sole-proprietor defendant, and any incarceration will directly prejudice the rights of paid subscribers to receive the material for which they paid.

An important example of the necessity for this appeal to be consolidated with the two related appeals, which were made issues in the Appellee's Brief, is the subject of the R.I.C.O. treble damage awarded in the *McCullough* civil case before Judge Parsons. In the Government's List Of Authorities and the text of its Appellee's Brief, it lists and comments and relies upon—

> "McCullough v. Suter, No. 82 C 6115 (N.D.Ill) *appeal pending*, No. 84-1516 (7th Cir.) 14
>
> "SEC v. Suter, 732 F.2d 1294 (7th Cir. 1984) .. 11
>
> "Suter v. SEC, No. 83-3011 (7th Cir. filed Nov. 16, 1983) ..... 11."

On page 11 of appellee's brief is stated, *inter alia*,

> "The written plea agreement provided that 'at the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose' (A35), but the government would 'fully apprise the district court . . . of the nature, scope and extent of defendant's conduct regarding the charges against him, and related matters . . .' . . . . After the guilty plea was accepted, the district judge inquired about possible restitution to the defendant's victims. . . .
>
> . . . The prosecutor then advised the court that defendant's registration with the Securities and Exchange Commission (SEC) as an investment advisor had just been revoked, which cast doubt on defendant's future earnings and, thus, his ability to make full restitution."

On October 21, 1983, the defendant appeared for sentencing, but the sentencing was continued until January 24, 1984.

His plea was entered in reliance upon the government's promise that

"12. At the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose." (App. 37)

Since defendant believed and relied upon that promise, he was surprised when the Assistant United States Attorney advised the Court that—

"MS. FABRI: Your Honor, I believe that the most serious question that we have to address today, now that we have some resolution as to the amount [of proposed restitution], is the manner in which Mr. Suter can reasonably be expected to make this restitution.

I don't know if the Court is aware of an order entered by the Securities & Exchange Commission earlier this week. That order, as I understand it, your Honor—and I will just read the last sentence—

MR. ARNETT: This week?

MS. FABRI: Could have been last week. I am not certain, Mr. Arnett. I received a copy of it this week.

'Under all the circumstances, we are convinced that the public interest requires the revocation of Suter's investment advisor registration and his bar from association with any investment advisor.'

* * *

. . . So that if this administrative decision does go into force and effect . . . the result of it would be that Mr. Suter cannot publish his newsletter. . . .

Judge, I think a very serious question is presented to the court as to how Mr. Suter can reasonably be expected to make restitution. . . ." (TR 6)

Assistant U. S. Attorney Fabri knew or should have known that she was incorrectly stating the law inasmuch as Mr. Suter has a right to publish his financial newsletter without being a registered investment advisor, both

under the exemption of 15 U.S.C. 80b-2(a)(11)(D) and under the First Amendment Freedom of the Press. It appears that she was violating the Plea Agreement not to make any recommendation about sentencing by suggesting to the Court that there allegedly was "a very serious question . . . as to how Mr. Suter can reasonably be expected to make restitution." The inescapable inference is that, since he can't make restitution because he allegedly would be unable to continue publication, according to her, it was being implicitly recommended that he should be sentenced to incarceration rather than probation.

She went on to argue, "I recognize that you are considering a sentence of probation and, of course, pursuant to the plea agreement, *I can make no recommendation,* **but** I submit, your Honor, you have a great deal of flexibility built into the system." (TR 7) Then the Government apparently further violated its promise not to make recommendation for some sentence more severe than probation, by stating, 1984, Orwellian style:

> "I would urge you, Judge, *although I am not* requesting or *recommending a sentence of incarceration*—pursuant to our plea agreement, *I cannot do that,* and I understand that *the Court is inclined to give a sentence of probation* if Mr. Suter were to agree to make restitution; *but, Judge,* if you impose a sentence of probation for two or three years, Mr. Suter may not be able to make this money in two or three years. The government and *all of these victims are without recourse if a period of probation is imposed* until the last day of that probationary period. That would be the time that Mr. Suter is deemed to have violated his probation." (App. 53; emphasis added)
>
> "—and again, I have to underscore I am not recommending this." (App. 53)

For the prosecutor to state that "victims are without recourse if a period of probation is imposed" is but another way of recommending prison, in violation of the contractual agreement for the government to make no recommendation at sentencing. By such arguments, the Government has, defendant believes, so breached the term of the plea agreement to "make no recommendation to the judge concerning what sentence or fine to impose" that he should, on that ground alone, be entitled to have the plea vacated and the indictment dismissed.

On page 14 of the government's brief is stated:

> "Turning away from defendant's obligation to show a fair and just reason and the additional question of prejudice to the government, the district judge believed the consequential effect of the guilty plea on civil litigation pending against the defendant 'does appear to be something which motivates his present motion to withdraw his plea.' 1-24-84 Tr. 4. The district court's view is borne out by a pleading defendant filed in certain civil litigation, *McCullough v. Suter*, No. 82 C 6115 (N.D.Ill.), now before this Court on defendant's appeal, docket No. 84-1516. . . ."

Since the Trial Court in this case failed and neglected to suggest that the restitution being sought in the McCullough related civil case would duplicate the restitution being awarded here, and since the Court also failed to make reference to the possibility of treble damages in the civil case, Defendant was thereby not adequately instructed as to the consequences of his guilty plea. Conversely, since Judge Parsons awarded treble damages under the Racketeering Act in the civil case whereas there had been no Racketeering charge in the indictment in this criminal case, there was not only a lack of adequate warning and questioning by Judge Grady before accepting the guilty plea; but it is also a clear illustration

of the need to consolidate this case with two pending appeals in the Seventh Circuit, *McCullough v. Suter*, No. 84-1516 and *Suter v. SEC*, No. 83-3011, so that Petitioner can adequately give this Court the full, overall picture which appears to him to be proof of the selective and vindictive prosecution being waged against him simultaneously through the U. S. Attorney's office, the S.E.C. administrative proceedings, the other SEC civil district court proceedings, the McCullough civil case and similar cases in the State court. Thus, the extreme prejudice against defendant, by having to defend the cases separately in multiple litigation far outweighs any possible prejudice against the government if the guilty plea would have been vacated.

The government's case of *United States v. Block*, 660 F.2d 1086 (5th Cir. 1981) is as applicable to the defendant's view of the case as to theirs. "A number of cases have concluded that an agreement not to take a position on the sentence or an agreement to stand mute at the sentence hearing prohibits the Government from attempting to influence the sentencing judge." (p. 1090) Yet, although that was the agreement in this case, the government made false and misleading statements with regard to defendant's investment advisor's registration, to wit, "defendant's registration with the Securities and Exchange Commission as an investment advisor had just been revoked, which cast doubt on defendant's future earnings, and thus, his ability to make full restitution." The prosecutor should have known that the facts were that defendant's principal income is from publishing newsletters, and in fact that none of defendant's income came from "investment advisor" activities. The prosecutor being a trained lawyer, she should have realized that the First Amendment to the Constitution of the United States guarantees the defendant the absolute right to publish any

truthful material, without any government license whatever. Further, the fact of the matter is that defendant is publishing exactly the same newsletter today that he had been publishing before the SEC action. The SEC ruling did not direct him to stop publishing the newsletter, only to refrain from publishing any inaccurate facts in his subscription solicitations.

Responding to the government's argument about Rule 11, where appellee discusses subsections (a)(2), (c)(1), and (f), the United States Supreme Court expresses defendant's viewpoint:

> "We agree with petitioner that the District Judge did not comply with Rule 11 in this case: and in reversing the Court of Appeals, we hold that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal. . . .
>
> "To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to 'assumptions' not based upon recorded responses to his inquiries."

McCarthy v. United States, 394 U.S. 459, 467 (1968).

It seems evident that Judge Grady relied upon an assumption that defendant would lose income as a result of the SEC revocation of his investment advisor status,

since the prosecutor had falsely implied (TR 6) that this would prevent him from continuing to publish his newsletter. In the words of the *McCarthy* case, when "the district court resorts to 'assumptions' not based upon [truthful] recorded responses to his inquiries", then these Rule 11 goals are undermined.

The government's reference to two related Suter cases raises the issue of multiple punishments as well as the original issue of selective and vindictive prosecutions. The Fifth Amendment protects against multiple prosecutions; *North Carolina v. Pearce,* 395 U.S. 711 (1969) made that clear:

> "The Court has held today, in *Benton v. Maryland, post,* p. 784, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections.[8] It protects against a second prosecution for the same offense after acquittal.[9] It protects against a second prosecution for the same offense after conviction.[10] And it protects against multiple punishments for the same offense.[11] This last protection is what is necessarily implicated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured. The Court stated the controlling constitutional principle almost 100 years ago, in the landmark case of *Ex parte Lange,* 18 Wall. 163, 168." (pp. 717-718) (footnotes omitted).

This Court is respectfully requested to find that the entry of treble damages under RICO, a Title 18 statute, in the related civil McCullough case quoted in appellee's brief, constitutes being twice punished, unconstitutionally. The inquiry, then, is into the meaning of "double" or "multiple" punishment. The Supreme Court held in *North Carolina v. Pearce, supra,* page 730:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence. *Id.*, at 168."

The punishment of RICO treble damages imposed by Judge Parsons in a related civil case, in addition to the restitution imposed by Judge Grady in this case, is "to bring the party within the jurisdiction of more than one court".

The Government relied in its brief upon, among other cases, *United States v. Gaertner*, 583 F.2d 308 (7th Cir. 1978) where the constitutionality of the plea bargaining process was questioned: "It does not appear that Gaertner raised this claim . . . before the district court, and he has not made any serious attempt to advance an argument in support of his claim in this court". In the instant case, Suter is challenging the constitutionality of selectively prosecuting him because of his political activities.

Certainly his Motion to Dismiss for Selective Prosecution is allowed for within the pretrial motion scheme, by Rule 12(e). The court may defer decision if production of evidence will clarify the issue; so the Court erred in not allowing production of evidence of the constitutional objection.

Counsel for petitioner is well aware that the two sides in a case can view a given set of facts in two different

lights. For example, the government had quoted and referred to one of the cases of the *Securities and Exchange Commission v. Richard W. Suter*, 732 F.2d 1294 (7th Cir. 1984) as though it helps their view of the case. From Suter's viewpoint, however, the existence of this series of cases in which he is defendant—the above S.E.C. case, another S.E.C. case "*Suter v. SEC*, No. 83-3011 (7th Cir. filed Nov. 16, 1983)" and "*McCullough v. Suter*, No. 82 C 6115 (N.D. Ill.) appeal No. 84-1516 (7th Cir.)"—all listed in the United States' brief—are proof positive that he is being selectively prosecuted for his political activities, as he would have been more able to show if the Court had allowed him an evidentiary hearing on the subject.

Petitioner Suter's Motion to Dismiss the Indictment for Selective Prosecution . . . for his Political Activities (App. 19) together with the supporting affidavit are the crux of this petition. The supporting Affidavit together with the Exhibits were not meant, in and of themselves, to constitute adequate evidence upon which the Court could have determined whether there was sufficient violation of defendants rights to form the basis for dismissing the indictment. Rather, they were the basis for requiring the Court, in its discretion, to have granted a full evidentiary hearing on the issue of the alleged Selective Prosecution, for political activities.

This Court's attention is directed to the Affidavit, pages 6 and 7 of the Motion to Dismiss where it states:

> "I was Illinois Chairman of the Libertarian Party in 1976. My activities were and still are directed toward reduction in taxes and in governmental activity generally . . . . We were involved in the formation of a new political party, the Taxpayers Party . . . ." (App. 24)

> "4. In 1980, an individual with similar political beliefs was passing out political handbills . . . . A young woman took one . . . and . . . she inquired whether this was the organization that Richard Suter was associated with. . . .(S)he told him that her name was Barbara and that she worked for the S.E.C. Shortly thereafter, the Securities and Exchange Commission began an administrative proceeding against me and my company, the National Investment Publishing Company . . . . Simultaneously it filed a related civil action now pending . . . ." (App. 26)

This Court should weigh carefully two constitutional principles and rights; they are the exercise of the discretionary powers of the United States Attorneys over criminal prosecutions versus the defendant's First Amendment rights of Freedom of Speech and Assembly, to petition the government for a Redress of Grievances. His political activities, through the process of petitioning for such redress from excessively high taxes, have been exactly the exercise of such rights, directed to assisting and educating other citizens similarly concerned with high taxes resulting from unnecessary growth of government at various levels.

The principle that we have no political prisoners in these United States is so ingrained in our thinking about our constitutional scheme of government, that there appears to be virtually no listing in the various legal indices under Political; and even a heading of Selective Prosecution or Discriminatory Enforcement is few and far between. This may well be a case of first impression as to whether the "doctrine of separation of powers" allows the district court to overrule the discretion of the prosecutor as the only means of protecting this kind of defendant from being deprived of his aforesaid constitutional rights by a selective prosecution.

This selective prosecution for political activities is not only encroaching upon Richard Suter's Rights of Freedom and Speech, Assembly, and Petitioning for Redress of Grievances; but it is also encroaching upon his right to Freedom of the Press inasmuch as his finanical newsletters of regular and general circulation regularly have espoused his conservative political views.

"In our tripartite system of government, the three branches are co-equal, and *the Constitution is superior to each* branch. The supremacy of the Constitution, the supremacy of the 'consent of the governed,' requires that each branch adhere to constitutional principles in the exercise of its powers.

> "Ideally, constitutionally, the judiciary measures the other branches' adherence to constitutional principles only secondarily, after the primary measure of adherence has been taken by the co-equal branch itself. Thus, the prosecutor's decision to prosecute must always be made with constitutional limits on discretion in mind. Then, the judiciary performs the very limited role of secondarily measuring the primary decision of the prosecutor against constitutional standards. . . . Mr. Chief Justice Burger, writing for a unanimous court, encapsulated this basic aspect of our Tripartite government, in *United States v. Nixon*, 418 U.S. 683, 703 . . . (1974):
>
> > 'In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *United States v. Johnson*, 577 F.2d 1304, 1307-8 (5th Cir., 1978; emphasis added).' "

"Nearly a century ago, the Supreme Court concluded that the administration of laws 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances' constituted a denial of equal protection of the laws. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 . . . (1886). . . . This admonition is applicable to the federal government through the equal protection component of the Fifth Amendment due process clause. . . .

"A test for deciding when a decision to prosecute unconstitutionally denies equal protection of the laws was set forth by the United States Court of Appeals for the Second Circuit in *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974):

> 'To support a defense of selective or disc[r]iminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*,
>
> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
>
> (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion or the desire to prevent his exercise of constitutional rights.'
>
> These two essential elements are sometimes referred to as 'intentional and purposeful discrimination'." *Id.* at 1308.

A majority of the United States Court of Appeals have recognized the "test for deciding when a decision to prosecute unconstitutionally denies equal protection", according to the *Johnson* case, supra, including the two elements of intentional and purposeful discrimination.

The situation here is more complicated than the *Johnson* case, however; because there the simple answer was that "the conduct for which he was prosecuted is not ordinarily ignored." In the instant Suter case, whether the use of the mails in a way that 23 customers apparently complained to the authorities is conduct ordinarily prosecuted is just part of the question. The overall circumstances include whether a person who is engaged in the conduct of publishing newsletters, including for a time a newsletter about investing in coins, is ordinarily simultaneously prosecuted in a criminal case, a case by the SEC, an administrative case by the SEC, and various civil cases by some of the complainants in the criminal case. This is what constitutes the unconstitutional discriminatory prosecution for his political activities.

In *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974) the Court reasoned:

> "In his opinion Judge Judd held that Berrios' allegations warranted a hearing on the selective prosecution issue and that Berrios' 'offer of proof' was sufficient to create a prima facie case of selective prosecution" (pp. 1210-11).

The Court of Appeals in remanding the case for further proceedings ruled,

> "Notwithstanding the apparent weakness of Berrios' claim [of selective prosecution], we recognize that the decision to permit a hearing and, in anticipation thereof, to authorize a subpoena of evidence in the government's possession, lies largely in the trial judge's discretion" (p. 1212).

This Court should consider the reasoning in *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973):

> "Certainly, the prospect of government prosecutors being called to the stand by every criminal defendant for cross-examination as to their motives in seeking

an indictment is to be avoided. That does not mean that a criminal defendant is never to be afforded an opportunity to prove that the prosecution stems from an improper prosecutorial design or that he may never question a prosecutor under oath. The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice. However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised. . . .

"The particular circumstances of this case which we believe compelled the government to accept the burden of proving nondiscriminatory enforcement of the law are several. . . .

> *'[A]n enforcement procedure that focuses upon the vocal offender is inherently suspect,* since it is vulnerable to the charge that *those chosen for prosecution are being punished for their expression of ideas,* a constitutionally protected right.'

In the present case there are several indications that this was exactly the purpose of the prosecution." (p. 621; emphasis added)

"An individual's right to equal protection, it has been held as a general principle, may be violated by discriminatory administration of a law that is impartial on its face. It has been indicated that this principle is properly applicable to enforcement of the criminal law and that a violation may be established where the accused is able to show that other individuals similarly situated have not generally been prosecuted, that the alleged discrimination in the circumstances presented was intentional or purposeful, and that the selection of the accused for prosecution was based on an arbitrary or invidious classification", 21A Am.Jur.2d 281.

"Oaks contends that he was selected for prosecution solely because he protested publicly against federal tax policies. While we express no opinion on this issue, the law in the circuit requires the district court, upon a proper offer of proof, to allow Oaks to present evidence, if any, that he has been singled out for discriminatory prosecutions." *United States v. Oaks*, 508 F.2d 1403 (1974, 9th Cir.)

"(A) policy of selective prosecution which purposefully discriminates against persons choosing to exercise their First Amendment rights is impermissible. . . . Hearings on similar pretrial objections are usually in order when enough facts are alleged to take the question past the frivolous stage. . . . We hold that Oaks has alleged enough facts to require an evidentiary hearing. . . . If the district court finds that there was impermissible discrimination, it should dismiss the indictment. (pp. 1404-5)" *Id.*

"That a claim of discriminatory enforcement may be raised as a defense to a criminal charge is clear in New York law." *Hendricks, et al. v. Hogan, et al.*, 324 F.Supp. 1277, 1282 (1971).

It is beyond question that freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty protected from governmental intrusion by the First and Fourteenth Amendments. Moreover, privacy in that association—particularly with respect to groups championing unpopular causes—is a vital incident of the primary right. Indeed, inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

Relevant portions of the Plea Agreement (App. 32) include these. Defendant owns and operates "the National Investment Publishing Company. . . . During the years

1976 through 1981 he offered through the newsletter to obtain coins on behalf of collectors or investors in return for a fee or commission on each sale." [par. 6.(1)]

> "In connection therewith defendant solicited and received money from various collectors and investors which money had been sent for the purpose of defendant obtaining coins either on a discretionary basis or specific request basis.
>
> * * *
>
> "12. At the time of sentencing, the government shall make no recommendation to the judge concerning what sentence or fine to impose. . . .
>
> "15. . . . the government will move to dismiss the remaining counts of the indictment."

At apparently the same time when Rule 32, F.R.Cr.P., was amended to add "upon a showing by the defendant of any fair and just reason", Rule 32.1 was also added, all of which are so new that they remain in the Pocket Parts of *United States Code Annotated*, "For Use In 1984". The latter rule includes, "A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him." By analogy, since the prospect of Defendant Suter's serving time in a penitentiary is a certainty, "unless the relief granted" through this appeal "upon his request or the court's own motion is favorable to him",—and this is more serious and far less "favorable to him" than would be probation—"A hearing and assistance of counsel are required" by the general principles of Due Process, before the Court determines, under amended Rule 32(d), whether Defendant can be deemed to have had adequate opportunity to sustain his burden of proving that he has "any fair and just reason" for be-

ing allowed to withdraw his guilty plea before sentencing. The amended rules being quoted above read as follows:

> Rule 32(d). "If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. . . ."
>
> Rule 32.1(b). "A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him."

As stated in Rule 32(d),

> "If a motion for withdrawal of a plea of guilty . . . is made before sentence is imposed . . ., *the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.*"

The emphasized clause was added, apparently in 1983; and it was intended to clarify the standard applicable to plea withdrawal under this rule. Although this amended section 32(d) is at best a minor one in terms of how post-sentence motions to withdraw pleas will be decided, the "fair and just" standard requires that the defendant have the burden of showing a "fair and just" reason for withdrawal of the plea. Unless a defendant seeking a withdrawal is granted a full and fair hearing, however, as Defendant Suter was not, he has been denied the opportunity which Due Process would require for a litigant to have a chance to uphold the burden of proof imposed upon him by this amended rule.

SUMMARY AND CONCLUSION

It is therefore respectfully suggested that the United States Supreme Court find that the Seventh Circuit Court of Appeals erred in not consolidating three related appeals where Petitioner was Defendant. It is respectfully requested that a Writ of Certiorari issue to the Seventh Circuit so that this Court can determine whether, had such consolidation occurred, the Petitioner has been deprived of constitutional rights of Freedom of Speech and of the Press, and of the right against Double Jeopardy and Selective Prosecution for Political Activities.

It is further requested that this Court stay all proceedings in this matter pending the appeal in *McCullough v. Suter*, No. 84-1516, decided by the Seventh Circuit on March 13, 1985; and stay proceedings until the Supreme Court reaches its decision in the pending *S.E.C. v. Christopher Lowe* case, No. 83-1911, so that Petitioner may also appeal his pending case, *S.E.C. v. Richard W. Suter*, No. 83-3011, presently stayed by the Seventh Circuit awaiting the decision in the *Lowe* case. Then the aforesaid three Suter cases, Nos. 83-3011, 84-1516, and 84-1198 (the instant case) could all be consolidated in the Supreme Court of the United States to determine whether such multiplicity of litigation constitutes unconstitutional selective prosecution or multiple jeopardy.

Respectfully submitted,

GORDON JAMES ARNETT
5875 N. Lincoln Avenue
Chicago, Illinois 60659
(312) 334-0400
Attorney for Petitioner